Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

MICHAEL C. VINYARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner seeks writ to contest the Fourth Circuit Panel's decision to expand the scope of the offense of mail fraud under 18 U.S.C. §1346 to include those acts which occur in a private business context so that conviction is permissible even if no actual economic harm occurred to the alleged victim. Such decision is in conflict with the decisions of other Circuit cases. Mail fraud prosecuted under 18 U.S.C. §1346, requires either the loss of property or money or the loss of honest services of an employee. If there is no actual loss of property or money, the only claim can be loss of honest efforts of an employee. This is a case of private sector employment and without actual loss, the loss of services of an employee is not of the kind anticipated under the mail fraud statute. The decision, also seeks to adopt a new legal standard, the use of a "reasonable foreseeablity" test. This test improperly shifts the elements of proof necessary for a conviction of mail fraud and is in conflict with standards adopted by other circuits.

2. Petitioner seeks writ to contest the Fourth Circuit's failure to give proper consideration to the multiple incidents of prosecutorial misconduct which lead to his being denied a fair trial. This decision and its failure to address such misconduct is in conflict with recent cases of the Ninth Circuit Court of Appeals. Specifically, that Government Counsel had in his possession, documents which demonstrated that the chief witness against the Petitioner was committing perjury. That said counsel did not release said documents to the Petitioner, even through proper request had been made, and instead, engaged in specific acts of misconduct to sponser such perjuried

testimony as such testimony was required for conviction.

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STATEMENT OF JURISDICTION

Indictment was returned against the Defendant-Appellant, charging him with 20 Counts of Mail Fraud in violation of Title 18 U.S.C. §1341, 1346, and 12 Counts of Money Laundering in violation of 18 U.S.C. §1956(a)(1)(B(i) and 2. Appeal was denied by the Fourth Circuit Court of Appeals on September 11, 2001. Petitioner made application for rehearing and rehearing en banc which was denied by the Fourth Circuit on October 10, 2001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

On May 5, 1999, Petitioner was indicted in the District of South Carolina with 20 Counts of Mail Fraud in violation of Title 18 U.S.C. §1341, 1346 and 2, and 12 Counts of Money Laundering in violation of 18 U.S.C. §1956(a)(1)(B(i) and 2. Trial by jury commenced on August 24, 1999, with the Honorable Cameron M. Currie, United States District Judge for the District of South Carolina presiding. Verdict was returned on August 26, 1999, with the Petitioner, hereinafter Michael Vinyard, being convicted of one count of Mail Fraud and one count of Money Laundering. Sentencing was held on May 24, 2000, with Judgment entered on June 5, 2000. Notice of Appeal was timely filed on June 6, 2000. The appeal was denied on September 11, 2001, and petition for rehearing and hearing en banc was denied on October 10, 2001.

STATEMENT OF THE FACTS

Michael Charles Vinyard was a practicing attorney in Ottumwa, Iowa. In the fall of 1990, Michael received a call from his only brother, James Stewart Vinyard, which

was to change his life. James Vinyard was, at the time, working for a company known as Sonoco Products Company, hereinafter Sonoco, in the High Density Film Products Division. His division was responsible for manufacturing plastic grocery bags. During August of 1990, this division began to explore the use of recycled plastic as a method of lowering costs. James began to discuss this concept with other Sonoco executives who came to the conclusion such business should be handled through a broker. This broker was to initiate contacts in the industry and to develop resin manufacturers and bag manufacturers/converters to develop sources for scrap and/or recycled resin needed for the manufacture of grocery bags.

On September 24, 1990, Harris DeLoach, executive with supervision over the High Density Film Products Division approved the concept outlined above. However, it was decided that Sonoco wanted to have these tasks performed outside of the company so that they would not have to create a position in-house and have the costs of such a position. It was also decided that because Sonoco did not want it known in the industry or to the consumers that they were using scrap or recycled material, a broker would aid in maintaining confidentiality. James Vinyard was given the responsibility of locating such a broker and working with him.

With these instructions, James Vinyard made that fateful phone call informing his brother that they were going into business together. Michael, who had no knowledge of the plastic's industry, was informed that they were going to be plastic brokers and that James would teach him all he needed to know. James stated that Sonoco wanted to get into the recycling business and that he had been directed by Sonoco to set up some sort of program,

using a broker or outside party to go into the marketplace and obtain these products. James said that Sonoco didn't want to do this brokering in-house because of the cost of setting up another department and the related costs of employees to man that operation. James stated that confidentiality was the key and that Sonoco did not want anyone finding out that they were dealing in scrap or recycled material instead of virgin resin. James claimed that if the competitors knew of this they would use it against Sonoco in the marketplace.

With these criteria in mind it was decided to create Charles Stewart Enterprises. Charles Stewart Enterprises, hereinafter CSE, was created as a corporation in the State of Iowa for the purpose of acting on Sonoco's behalf to obtain recycled resin thus ensuring confidentiality. James told Mike that the name Vinyard was already known to suppliers and to competitors and that he was afraid that use of his name would permit competitors to make the connection to Sonoco. So at James request, Michael Vinyard incorporated CSE using his law partner Patrick Curran as incorporator and listed him as the principal officers.

CSE had a clear division of labor. James made all the contacts, did all the deals, dealt with all the people at Sonoco and handled all questions about CSE. Michael provided the physical location for the phone line and fax machine and provided secretarial support to fill out invoices and checks as needed. CSE was supposed to be a short term project with James indicating that he believed Sonoco would eventually take over the project in-house once the profitability was demonstrated. To keep Michael believing that he had the full support of Sonoco, James would send internal memos to Michael showing that Sonoco was aware of the activities of CSE and the profit to be had by doing the same work in-house.

During the course of operation, CSE had an adjusted earnings for the period 1992 to 1997 of $2,784,946.50. During this same period, in this division alone, Sonoco had before tax profits of $136,501,720.81. At least $4,095,051.62 in profits which were due to the use of non-virgin resin, collected and arranged by CSE. On these facts Michael Charles Vinyard went to trial and was found guilty.

ARGUMENT

I. Improper expansion of the mail fraud statute.

Michael Vinyard was charged under 18 U.S.C. § 1346, which provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme to deprive another of the intangible right of honest services." However, § 1346 has not been interpreted to expand broadly the reach of the mail fraud statute, especially in the context of acts which allegedly deprive a private entity of a right to services. In United States V. Frost, 125 F.3d 346, 365 (6th Cir. 1997), the court stated as follows with respect to § 1346:

> "The right of the public to the honest services of its officials derives at least in part from the concept that corruption and denigration of the common good violates "the essence of the political contract." . . . Enforcement of an intangible right to honest services in the private sector, however, has a much weaker justification because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving "honest

services" for their own sake." *Id* at 365.

After recognizing that there might be some situations where a private employer's deprivation of a right to honest services could be the basis for a mail fraud prosecution under § 1346, the court held that those situations were limited as follows:

> "The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach. We therefore adopt the standard employed by the District of Columbia Circuit, which holds that an employee deprives his employer of honest services when "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction." United States v. Lemire, 720 F.2d 1327,1337 (D.C. Cir. 1983). Proof that the employer simply suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict. *Id* at 368.

This limitation upon the application of "honest services" type mail fraud prosecutions in the private commercial setting is reflected in many other decisions. For example, in United States v. Cochran, 109 F.3d 660 (10th Cir. 1997), the court stated as follows:

> "[I]t would give us great pause if a right to honest services is violated by every breach of contract or

every misstatement made in the course of dealing.... But we agree that in the absence of actual or potential harm, evidence independent of the alleged scheme must be adduced to show fraudulent intent toward the alleged victims." *Id.* at 667-68 (citations omitted).

The court went on to reverse the mail fraud conviction of the underwriter of a bond issuance who had misrepresented the fact that he would not receive any fee where it was not shown that the defendant either intended to inflict or actually inflicted any harm upon the issuing corporation or the bondholders. *Id.* at 669.

In United States v. Jain, 93 F.3d 436 (8th Cir. 1996), the court reversed a mail fraud conviction based upon § 1346 where the alleged scheme involved a psychiatrist's receipt of kickbacks for referring patients to a particular hospital. The court pointed out that there was no evidence that the psychiatrist's patients, the alleged victims of the scheme, suffered any tangible harm; the psychiatrist and the hospital provided quality services and no patient was financially harmed by the arrangement. *id.* at 441. Although conceding that private sector schemes are covered by § 1346, the court stated as follows:

> "[B]ut the transition from public to private sector in this context raises troublesome issues. In a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern

> what intangible "rights" have been violated. For example, what "honest service" do we expect from a used car salesman, beyond a truthful description of the car being sold? Thus, prior intangible rights convictions involving private sector relationships have almost invariably included proof of actual harm to the victims' tangible interests. *Id.* at 441-42.

The court went on to point out that the essence of a scheme to defraud is an intent to harm the victim, and because no such harm was shown in this case, the evidence did not sustain the psychiatrist's mail fraud conviction. *Id.* at 442.

Similarly, in United States v. Sun-Diamond Growers of California, 138 F.3d 961,973 (D.C. Cir. 1998), the court ruled that a mail fraud prosecution under § 1346 based upon a private employee's breach of trust must include a showing that harm was at least contemplated as part of the alleged scheme:

> "In the private sector context, § 1346 poses special risks. Every material act of dishonesty by an employee deprives the employer of that worker's "honest services," yet not every such act is converted into a federal crime by the mere use of the mails or interstate telephone system. Aware of the risk that federal criminal liability could metastasize, we held in *Lemire* that "not every breach of a fiduciary duty works a criminal fraud." *Lemire*, 720 F.2d at 1335, quoting United States v. George, 466 F.2d 508,512(7th Cir. 1973). Rather, "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337. Absent reasonably

> foreseeable economic harm, "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the (employee] is insufficient to convict. "

These cases clearly establish that a private-sector scheme to defraud which is based upon a deprivation of a right to "honest services" under § 1346 must at the very least contemplate that there be some intended harm to the victim to be within the scope of § 1341.

James Vinyard's testimony indicated that the reason he established Charles Stewart was to allow Sonoco to use the recycled materials in its operations, thereby saving Sonoco money and avoiding the troubles Sonoco thought would arise if it was discovered that Sonoco was using recycled materials. Further, the statements made by James in his interview with the FBI and his sentencing memorandum shows that James certainly did not intend to harm Sonoco, but was seeking to further its interests. The same is true with respect to the alleged recycling scheme; Sonoco was seeking a way to execute a recycling program, and CSE provided them with the opportunity and means of doing that.

While James perhaps should have disclosed his interest in CSE to Sonoco and may have taken steps which tended to prevent Sonoco from discovering his interest, the mere fact of nondisclosure is not enough to support a mail fraud conviction. In this context, it is only where the nondisclosure poses a business risk to the employer that there is a violation of the mail fraud statute. Sun-Diamond, 138 F.3d at 973.

Furthermore, if it can be shown that James and Michael benefitted from any disloyalty of James toward Sonoco, this does not mean that the mail fraud statute was

violated. As in Jain, 93 F.3d at 441-42, the psychiatrist benefitted from his dishonest behavior, but the court nonetheless held that there was not the kind of actual or reasonable possibility of harm to the alleged victims which could support a mail fraud conviction. It has been held that the intent to defraud necessary for a violation of the mail fraud statute cannot be based solely upon the defendants' appropriation of a gain or benefit to themselves, but it must also involve a loss or injury to another. United States v. Frank, 156 F.3d 332, 336 (2d Cir. 1998) (citing United States v. Starr, 816 F.2d 94,101 (2d Cir. 1987)).

The facts of this case do not indicate that the benefit to the Vinyards resulted in any loss or injury to Sonoco. The government did not sustain a case against Michael Vinyard for mail fraud on the basis that Sonoco was deprived of its right to James's honest services.

It also should be pointed out that, with respect to the so-called markup scheme, the mere fact that James did increase the price of the plastic Charles Stewart sold to Sonoco does not show that Sonoco suffered a tangible loss as a result of James's conduct. In United States v. Skeddle, 989 F. Supp. 873 (N.D. Ohio 1997), the court considered a challenge to the sufficiency of a mail fraud indictment which alleged that the defendants had violated their fiduciary duties to a corporation by engaging in undisclosed self-dealing with the corporation and acquiring millions of dollars from the corporation. Although the court upheld the sufficiency of the indictment, it did note that the government was required to demonstrate that the corporation had been injured by the defendants' breach of fiduciary duty. *Id.* at 879.

Moreover, such an injury could be demonstrated only if the jury found that the deals which formed the basis of the indictment were not fair to the corporation. The court

stated that "a contract or transaction which has been proven beyond a reasonable doubt to have caused harm cannot also have been fair," and so the proof would have to nullify the defendants' contentions that their self-dealing with the corporation was nonetheless fair dealing. *Id.*

In the instant case, the facts also indicate that the prices charged to Sonoco by CSE for the plastic were fair prices; DeLoach indicated that Sonoco would be willing to pay a certain amount for the plastic and the prices charged by CSE were within that range. Sonoco clearly received value for its payments, and also received the added benefit of obtaining this plastic without revelations to suppliers or customers. The same is true with respect to the so-called recycling scheme; there is nothing to indicate that Sonoco did not receive what it wanted in return for the services of CSE or that any charges made were not fair. Because the transactions at issue here were not unfair, there was not the kind of injury or harm to Sonoco which is necessary to support a conviction for mail fraud.

The indictment also alleges a scheme to defraud Sonoco "out of money and property." Again, however, a prosecution on this theory would fail for the lack of proof of actual or intended harm to Sonoco. Clearly if such evidence was presented it was only presented in the sentencing of James Vinyard and not to the jury of Michael Vinyard.

In United States D'Amato, 39 F.3d 1249 (2d Cir. 1994), the court explained what is necessary for a violation of the mail fraud statute:

> "The scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the government must show "that some actual harm or

> injury was contemplated by the schemer.... Because the defendant must intend to harm the fraud's victims, "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution." *Starr, 816* F.2d at 98. "

Thus, a mail fraud prosecution based upon an allegation that there was a scheme to defraud another of money or property also must show that there was some actual or contemplated injury or harm. James Vinyard's pretrial statements, and the statements attributed to him and the facts of this case indicate that no harm was inflicted on Sonoco or intended to be inflicted upon Sonoco. CSE was set up to achieve an objective of Sonoco's and did so without harm to Sonoco. The company was able to avail itself quietly of recycled plastics and was able to execute its recycling program. That the Vinyards profited from this does not mean that mail fraud was committed, especially since the terms of any transactions between Sonoco and CSE were fair. Skeddle, 989 F. Supp. at 879. Therefore, any prosecution of Michael Vinyard under § 1341 should fail.

Another important aspect to consider is that Sonoco made a knowing decision to pay out the money it did to CSE. While they did not know they were paying it to their employee and his brother, they certainly knew they were paying out the money to someone. Repeatedly James Vinyard tried to convince Sonoco that this was money that was being thrown away. Examine the internal memos. The internal memo dated March 1993 says that Harris DeLoach approved of the use of brokers. Other support is given by James's direct supervisor. These memos were all distributed to his chain of command and yet no one objected or directed him to take any other action..

Time after time, James told Sonoco it was throwing

away its money and it didn't have to. A memo dated January 7, 1991, informed the company that there were profits to be made Memos dated from before CSE was created through 1996 all describe the profits to be made and costs saved if the job being done by CSE was done in-house. As Sonoco chose to ignore this advice ,it cannot now be called a victim.

It is clear that the government was not required to even attempt to calculate a loss. They just assumed that if the employee got anything above his salary, money the company paid above that salary was loss. Evidence on the issue of loss was presented in the case of James Vinyard on August 3, 16, and 17, 1999. This evidence was resubmitted by the Government in this case and its previous arguments and theories adopted. Agent Flamini of the FBI was called and testified that he was a certified accountant who had access to the records from Sonoco Products Company for the years 1992 through 1997 when Charles Stewart Enterprises (CSE) was in operation. He was able to discover the total paid to CSE during that period of time as $12,115,785. Agent Flamini then testified that CSE paid out $9,268,741.27 to the various vendors leaving an adjusted earning for CSE of $2,784,946.50.

The Government wishes to end inquiry at that point. The Government could never get past the idea that James Vinyard was not entitled to this money because he was an employee. The Government operates under the idea that James, as an employee, can do nothing against the interest of the company. However this is not the same as "honest services" contemplated by the mail fraud statute. As earlier pointed out in United States v. Frost , *supra* at 368, the employee must have contemplated some concrete business harm to the employer. If he believes he is helping the company then no theft of honest labor. A clear case can

be made for the idea that James Vinyard began this operation for no other reason than to prove to the company that he was right about doing this operation in-house. He tells his brother this is going to be a short term operation and he send multiple memo's to Sonoco telling them of the advantages they are missing. Therefore, James is not hurting the company, or as he told the FBI, he is not intending to defraud Sonoco.

A fair reading of the evidence which was presented to the trial court can also be used to demonstrate that James did not even hurt Sonoco economically. Taking a sheer numbers approach, the actions of CSE did not cost Sonoco Products Company any money. At the trial of Michael Vinyard, the Defendant introduced Defendant's Exhibit 26 showing the before tax profit each year for the High Density Film Division of Sonoco Products Company. This is, of course, the division that James Vinyard worked in and through which all the CSE business was done. Using that exhibit it shows before taxes profit in the years of 1992 through 1997 totaling $136,501,720.81.

Testimony was given by Harris De Loach during James Vinyard's hearing on this issue of what profit might be attributable to the efforts of James Vinyard/CSE . Mr. De Loach is an executive vice president of Sonoco Products Company and has been with them for approximately 15 years and had been in the High Density Film Division from 1989 through 1993. Mr. De Loach was questioned about whether or not there was any profit for Sonoco in using recycled or non-virgin resin rather than virgin resin in the manufacture of its grocery bags. Since this was one of the main functions of CSE, its efforts may have generated profit for Sonoco. After much hesitation, Mr. DeLoach had to admit that a factor in the profitability of the division was the ability to use non-virgin resin. When further

questioned, Mr. De Loach admitted that 3 or 4 % of the profitability of the division would have come from the use of the non-virgin resin. Thus, since CSE was the party responsible for acquiring the non-virgin resin, 3 or 4% of the profitability of the division was due to the efforts of CSE.

Using Sonoco's own profit statements, 3% would generate $4,095,051.62 in profits due to the use of non-virgin resin for the years 1992 through 1997. Therefore, if Sonoco paid CSE $2,784,946.50, Sonoco still made a profit for the years 1992 through 1997 of $1,310,105.12 because of the efforts of James Vinyard/CSE. That is certainly not a loss by any stretch of the imagination.

The likely response by the Government is to argue that Sonoco could have kept the whole $4,095,051.62 but for the actions of the Defendants. This still misses the point. Sonoco did not lose money; they made money. Further, Sonoco got what it bargained for. According to the internal documents, it wanted to be able to buy non-virgin resin without the consumers or their competitors finding out. Sonoco wanted to operate through a broker to maintain confidentiality and to escape the need to create an in-house department that would have required staffing and the costs associated with that function.

A case in point is United States v. Dickler, 64 F.3d 818 (3rd Cir. 1995). In Dickler, a company was involved in reprocessing cars for a bank. The company would seize the car, and was supposed to get three bona fide bids on the car and send these to the bank. The bank would then either reject the bids and sell the car at auction or accept one of the bids and send the title to the company for sale. The problem was that the company was not soliciting bids but making their own bids and then selling the cars for profit. The Court found no loss and held:

> "[W]here the defendant intended to and did give the victim something of value in exchange for what was fraudulently taken, the value of the object or service taken will not reflect the victim's actual loss and another method of calculating actual loss must be used." *Id* at 825

The Court went on to hold:

> "Some fraud involved an intent to walk away with the full amount fraudulently obtained, while other fraud is committed to obtain a contract the fraud perpetrator intends to perform. Mechanical application of the theft guideline in fraud cases would frustrate the legislative purpose of the guidelines and contravene the specific language of the Commission." *Id* at 825

The Fourth Circuit seemed to ignore that it was Sonoco that set the price it would pay for materials. James Vinyard would operate within that frame work. Therefore he gave Sonoco the value, goods and services it desired, within the cost benefit analysis it established. The receipt of full value for goods and service also negates any loss from fraud. In United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997), the defendant was convicted of mail fraud because of his impersonation of a doctor. The Court found that value may be rendered even amid fraudulent conduct and that the patients treated by the defendant did not suffer a loss if they received adequate services. In United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996), the court looked at loss claimed in a mail fraud prosecution of a person who claimed to be a licensed attorney. Again the court reversed the enhancement based on loss pointing out

that a client who obtains a satisfactory contract, settlement, or verdict has received something of value. *Id* at 1311. Having stayed within the budget set by Sonoco, James Vinyard/CSE got it products and services at a very profitable level.

In summary, this is not a poor little old lady who was cheated out of her savings. This is a company that made over **one hundred million dollars in profit in one division.** A company that knew it was sending out payments to a "broker" when its in-house expert kept telling them they could do the job internally. This is not a company who "lost" anything.

The panel's decision to adopt a "reasonably foreseeable" test improperly expands the role of the federal government into regulation of private business transactions. Under such structure, we are now regulating acts of dishonesty alone, and that is not the purpose of the statute.

Other circuits have not been willing to adopt this expansion unless there is proof of actual harm to the victim's tangible interests. *See* United States v. Jain, 93 F.3d 436 (8th Cir. 1996). This case, in particular, is not the factual case that should be used to justify this expansion of the reach of 18 U.S.C. §1346. It is hard to pigeon-hole this case into the same type of conduct that has been considered in other cases since the company made a profit and James acted within the limits of his instructions. To apply broad sweeps to this set of facts will create bad law

2. Prosecutor Misconduct Denied the Defendant a Fair Trial.

The next issue which Petitioner wishes to address is the issue of the prosecution suppressing evidence which

it knew was exculpatory and favorable to the defense, then turning around and taking steps to sponser testimony that it knew or should have know was perjurious. The evidence suppressed was a sentencing memorandum prepared by the defense team for James Vinyard. This document contained a three page statement entitled "Statement of the Defendant." The document, written in the first person and contained in quotation marks, was filed with the court during sentencing hearing on August 3, 1999. The statement contains numerous statements which were substantially different from the testimony his brother gave at trial of Michael Vinyard. This document was not produced by the government, nor delivered to the Defendant.

The Petitioner sought to address this error by means of a Brady claim and arguing that the prosecutors actions in suppressing the evidence and then still using the testimony constituted misconduct sufficent to deny Michael a fair trial.

The three components of any Brady violation are (1) the evidence at issue must be favorable to the defendant whether directly or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material. United States v. Spicer, 194 F.3d 547 (1999). Should the Defendant meet these three components then his due process rights have been violated and he is entitled to a new trial. Brady v. Maryland, 373 U.S. 83 (1963) If a defendant does not make a specific request, the government must still turn over favorable evidence that is material. United States v. Agurs, 427 U.S. 97, 107-111 (1976) The requirement for turning over such evidence covers not only exculpatory evidence but impeachment evidence. *See* United States v. Bagley, 473 U.S. 667, 676-77 (1985); Giglio v. United States, 405 U.S.150

(1972).

In examining the evidence in question it is clear that the first component is met; i.e. that the evidence is favorable to the defense. The defense of Michael Vinyard focused on the fact that James Vinyard came to him with assurances that this company they were to create was done so at the request of Sonoco and with their knowledge. The first paragraph of this document says that James Vinyard had no fiduciary responsibilities in this regard and that every decision he made had to have the approval of someone above him. The document goes on to discuss in detail how CSE came into being. It describes the process whereby Sonoco chose to use an outside broker to meet its objectives. It even states that his supervisors were informed that James Vinyard and a friend were going to start a business of that nature and could handle the work for Sonoco and this was approved by the supervisor.

Not only is this evidence exculpatory, but it is also of tremendous impeachment value. These statements by James Vinyard as referenced above, contradict numerous statements given by this witness at trial. For example, at trial James Vinyard said that Sonoco had never approved this business and that he informed his brother that if they found out about it he would be fired. This is in direct contradiction to the sentencing memorandum in which James Vinyard asserts he didn't know he was doing anything wrong and that he had informed Sonoco of his involvement.

The seriousness of the impeachment value can be seen by the reaction of the government prosecutor when this document was introduced to the court. Assistant U.S. Attorney Bethea, the same prosecutor in the Michael Vinyard case, viewed these statements as a repudiation of the guilty plea, that James clearly was not accepting

responsibility for his actions and that this statement may even constitute obstruction of justice. The prosecutor even talked about the doubts he now had as to whether or not he was even going to call James Vinyard to the witness stand. The trial court even stated that this sentencing memorandum was a "substantial change of position from what I heard at the time of the guilty plea." The trial court even wondered if they could go forward with the guilty plea. The discussion became so heated that the defense decided to withdraw the document so the sentencing could go forward. Clearly the first component has been met.

The second component under Brady was that the evidence was suppressed by the state. Clearly the Government knew of its existence and, as evidenced in the transcript, actually had a copy of this statement in its possession. Also, it is undisputed that the Defendant made a request for production of such documents. However, even if a specific request for this specific document is not made, the government still must turn over such evidence which is material. Agurs, at 107-111. This burden is an affirmative one and once the prosecutor has information that he objectively and reasonably recognizes as exculpatory or of impeachment value he has a legal and ethical duty to disclose it. Spicer at 558.

The record before the court was that thePetitioner did not have this statement and it was not produced by the prosecution. At the sentencing of Michael Vinyard, some 10 months after the trial, new co-counsel for the Petitioner subpoenaed the sentencing memorandum. Trial Counsel for the Defendant informed the Court that it had not been available for trial. Assistant U.S. Attorney Bethea does not inform the Court that he has produced the document, instead claimed that Petitioner and his trial attorney were present when the issue of this document and its contents

came to light and suggest the Petitioner should have obtained it. The trial court then reviews the memorandum, admits that its content is contrary to some of James Vinyard's testimony at trial and that the Petitioner was entitled to it. This brings us to the issue of whether or not this evidence was material.

In United States v. Ellis, 121 F.3d 908 (4th Cir. 1997), the Court considered the statements of a bank robbery accomplice. In her first statement to the FBI, the accomplice named two different men as being involved. *Id* at 910. Later she changed her testimony and named the defendant. The first statement was never produced. *Id* at 911. The Court examined the history of what was considered material evidence. In footnote five the Court references the three situations, as outlined by the United States Supreme Court in United States v. Agurs *supra*, in which the government's failure to turn over Brady evidence may impact the trial.

> "The first situation, where the prosecution introduced testimony at trial that it knew or should have known was perjured, required reversal if there is any reasonable likelihood that the false testimony could have affected the jury.... In the second case, where the government failed to turn over a specific kind of exculpatory evidence requested by the defense, such non-disclosure was seldom if ever excusable.... Finally, in the third category, where the government failed to turn over exculpatory evidence either not requested or requested in a general way, reversal was necessary only when withholding the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial." Ellis at 915.

In the case at bar, an argument can be made for the first two scenarios without much difficulty. First examine the possibility that the prosecution introduced testimony that it knew to be perjured. The Assistant U.S. Attorney clearly knew the impact of the information contained in the sentencing memorandum. He accuses James Vinyard of possibly being guilty of obstruction of justice. The Prosecutor told James Vinyard that he is not going to get his downward departure motion if he sticks to this statement. These statements, actually addressed to the trial court, are nothing more than thinly veiled threats to James Vinyard to ensure he keeps in line as his brother's trial is rapidly approaching. However, this prosecutor also knew that James Vinyard was the key witness in the case. Assistant U.S. Attorney Bethea stated in the sentencing of James Vinyard that he didn't know if he could have gotten a conviction without James Vinyard and his testimony.

Even at the sentencing of James Vinyard, which took place after Michael Vinyard's sentencing, Assistant U.S. Attorney Bethea is still troubled by the content of that sentencing memorandum. He tells the trial court that those statements were not consistent with his guilt and that "it obviously required some work on the part of the government to deal with that issue." The "work" the government did on this problem was to spend four or five full days in prep session with James Vinyard preparing his testimony. A witness telling the truth does not need four or five days to recall the truth. A witness worried about being caught in multiple inconsistent statements <u>does</u> require such preparation.

The government, knowing of these statements, having not produced them, still sponsored this perjured testimony and even tried to protect their star witness at trial. When trial defense counsel questioned James

Vinyard about a statement in the FBI 302 report that "they never had any intention to defraud Sonoco," James Vinyard claimed he didn't understand the legal meaning of defraud. When James Vinyard was pressed harder on this issue, it was the government prosecutor who jumped up to try and save his witness.

As the government had these statements and didn't turn them over, spent four or five days rehearsing the witness' testimony, and then tried to hide the truth from the jury with objections, the criteria for scenario 1 is met. As James Vinyard was the key witness to the government's case by their own admission, such false testimony clearly affected the jury and tainted the result.

The second scenario, where the government failed to turn over a specific kind of exculpatory evidence requested by the defense is also met. The Defendant filed a Motion for Discovery on June 4, 1999. Said motion specifically requested "All statements of Defendant, whether made to the Government or to some other person, in the possession of the Government." The Motion also specifically addresses Brady material including "Evidence concerning acts by the Defendant which are inconsistent with the allegations of the indictment." Clearly the sentencing memorandum would fall into the categories requested by the defendant. Therefore such non-disclosure should not be excused.

Finally, even if it can be argued that the request was only of a general nature, this evidence was material and the government had a burden to disclose it. Materiality looks at the question of whether or not the failure of disclosure undermines the outcome of the trial. Ellis at 914; Van Brocklin, at 594. As previously discussed these statements have both exculpatory value and impeachment value. The sentencing memorandum suggests in two separate places

that Sonoco knew what CSE was doing and had approved. This directly supports the testimony of Michael Vinyard and is completely at odds with the perjured testimony of James Vinyard.

The memorandum is also valuable as impeachment. When cross-examined about his claim to the FBI, James Vinyard said that he didn't understand the legal meaning of the word defraud. How much more effective the examination would have been if trial counsel could have then pointed to the statements in the Sentencing Memorandum which was written only a few weeks before trial. However, Michael Vinyard was denied that opportunity because of the failures and actions of the prosecution. Impeachment alone may have been enough to change the outcome. For as the prosecutor stated, James Vinyard was the key witness and without his testimony, they could not prove the key element of knowledge.

Therefore, under any of the three scenarios described in United States v. Ellis, the Defendant has been denied due process and therefore a fair trial.

The Fourth Circuit fails to consider the relationship between the prosecutorial misconduct and its effect on the trial. Instead the panel focuses only on a techincal reading of the Brady issue only. The Circuit dismisses Michael's arguments of prosecutorial misconduct and overlooks numerous facts and applicable law particularly as it relates to the Government's suppression of the sentencing memorandum.

A perfect example of this failure is the Circuit's determination as to the standard of review. The panel improperly sets the standard of review as that of plain error because Michael did not raise the issues in the district court. However, the facts of this case are such that Michael could not raise these issues before the trial court. While

knowing of the existence of the memorandum, Michael did not receive a copy of the memorandum until after the date that his Notice of Appeal had to be filed.

Although the trial judge stated that Michael was entitled to it, no copies were immediately made available and, in fact took several weeks for such document to finally be made available to Michael's new counsel.

Further, Michael did not know the extent of the Government's actions in suborning perjury until after they were able to obtain the transcript of James' sentencing held after judgment was entered in Michael's case. Said transcript was not obtained until after the time for appeal had passed. Therefore, Michael could not raise this issue before the trial court.

The panel's decision limits its findings to the *Brady* violation. The component not addressed is that the Government was guilty of misconduct in not only suppressing the document, but in permitting false testimony. A reading of the transcript of the hearings on James Vinyard, held before Michael's trial, clearly demonstrates that the statements of James as contained in the sentencing memorandum was grossly inconsistent with his trial testimony.

The prosecutor accused James of obstructing justice and informed him that given the nature of the memorandum, he could not even be used as a witness. This sent a clear message that if James did not change his tune, he would not get the benefit of his plea bargain. This resulted in James withdrawing the memorandum, but instead of giving the document to Michael, the Government works to cover up the potential impact of the document.

The prosecutor happily tells the trial court at James' sentencing of the work the government had to do to deal

with the implications of the sentencing memorandum. The prosecutor tells the trial court of the four or five days of prep work that was done with James Vinyard to prepare his testimony.

A clear example of the impact of that prep-work by the Government is seen in the cross-examination of James Vinyard. When asked to explain the difference between his trial testimony, in which he said that Michael knew from the beginning that the action was illegal, and his previous statements to the FBI in November 1998 and the sentencing memorandum of August 1999, where he repeated stated there was no intent to defraud Sonoco, James, a college educated man, suddenly didn't know of the meaning of the word defraud. Given that kind of concern that the Government had and preparation of this critical witness by that same organization, it is not a mystery that James Vinyard suddenly did not know the meaning of the word "defraud" even though he used this key word and phrase in multiple statements.

Such prosecutorial misconduct is never addressed by the panel's decision although clearly raised in argument to the court. The panel's decision argues that we are merely speculating about the impact of the memorandum yet without stating the reasons concludes "it is unlikely that it would have altered the trial's results."

Given the time and effort put in by the prosecutor in hiding the document and then preparing his witness should it come out, the prosecutor was not speculating on the impact of that document, he knew it was potentially a fatal blow. The prosecutor clearly stated that without James' testimony, no conviction was possible. Even the panel's decision has to acknowledge the fact that the only proof of Michael's knowledge and willing participation in this scheme to defraud is James' assertions. Yet, the impact

of two documents stating there was no intent to defraud is dismissed.

Misconduct of the type describe is particularly critical given the current state of the federal system and its sentencing guidelines. Real risk exists, that given the nature of federal sentencing, that the only method for someone like James to avoid a serious jail sentences is to point the finger at someone else. This risk has not gone unnoticed by the federal courts. United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993).

Given these risk, there is a danger that leniency is sought at the expense of truth. The burden to ensure this does not happen must fall on the Government who has the responsibility to investigate the information of the informant and turn over all documents relating to that testimony. Commonwealth of N. Mariana Island v. Bowie, 243 F.3d 1109 (9th Cir. 2001)

For the Government to fail in that burden or merely become inactive, means that defendants are at the mercy of who ever reaches the prosecutor first and makes a deal, whether or not that deal results in truthful information being disclosed. Michael was held to a specific standard of conduct when the instruction on "willful blindness" was given. In other words, he was held criminally liable and knowledge was imputed to him if he turned a "blind eye" to the activities of his brother.

The same standard must be applied to the prosecutor. A prosecutor cannot avoid his constitutional obligations by remaining willfully ignorant of the facts or the possibility that the inform is only given to secure a sentence concession. Commonwealth of N. Mariana Islands v. Bowie, 243 F.3d at 1114.

Conclusion

For all the reasons stated herein, the Defendant-Appellant requests that his conviction and sentence be vacated and the case remanded to the District Court for a new trial.

Respectfully Submitted

Michael Charles Vinyard, Petitioner

By:_____

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED SEPTEMBER 11, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-4442

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL CHARLES VINYARD,

Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Cameron McGowan Currie, District Judge. (CR-99-429)

Argued: May 8, 2001

Decided: September 11, 2001

Before NIEMEYER, WILLIAMS, and KING, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Niemeyer and Judge Williams joined.

* * *

Appendix A

OPINION

KING, Circuit Judge:

Michael Vinyard was convicted by a jury in the District of South Carolina of fourteen counts of mail fraud and twelve counts of money laundering. He was sentenced to seventy months imprisonment, followed by three years of supervised release, and ordered to pay restitution in a sum exceeding $1.4 million. In his appeal, Vinyard challenges the validity of his convictions and sentence. For the reasons explained below, we affirm.

I.

Michael Vinyard ("Michael"), a practicing attorney in Iowa, was invited by his brother, James Vinyard ("James"), in the fall of 1990, to enter into a joint business venture. At that time, James was employed in South Carolina by the Sonoco Products Corporation ("Sonoco"). Sonoco's high density film products division, which manufactures plastic grocery bags, had decided to explore opportunities to use recycled materials, and had installed James as Recycling Manager. Believing that it would be most efficient to handle Sonoco's recycling efforts internally, James actively campaigned to form a new recycling division within the company, which he proposed to head. Sonoco, however, did not want the industry or consumers to know that it was using scrap or recycled materials, and instead it directed James to employ an independent broker to research potential sources of recycled resins and to negotiate deals for

Sonoco on a confidential basis. Rather than locate such a broker, James devised a more personally lucrative solution: the creation of his own brokerage. James enlisted the services of his brother, Michael, and together they created the entity Charles Stewart Enterprises ("CSE"). CSE was incorporated in the State of Iowa, with the incorporation documents naming Michael's law partner as the incorporator and President.

James took charge of CSE's operations from its inception, while administrative matters were relegated to Michael. Michael's responsibilities consisted chiefly of providing CSE with office space in his law firm, arranging the installation of separate phone and fax lines, and retaining secretarial and accounting services.[1] Under James's direction, CSE presented itself to Sonoco and plastic vendors as an independent broker; it purchased recycled resins from various vendors and sold them to Sonoco, collecting a commission on each sale. Sonoco was led to believe that Charles Stewart was an actual person at CSE and also that CSE was a legitimate broker of recycled plastic pellets that could provide such pellets at the lowest possible price. In addition to its brokering operations, CSE became involved in the enterprise of collecting used grocery bags from Sonoco customers and selling them for an unlawful commission (i.e., a kickback)

1. Initially, CSE's clerical work was performed by secretaries in Michael's law office. This arrangement proved awkward, however, and Michael fired one of the secretaries, Beverly Wells, after she objected to working on CSE matters. Eventually Michael hired office managers to handle CSE's administrative/accounting tasks, such as preparing invoices, receiving payments for materials, paying suppliers, and preparing CSE's tax returns.

to companies that would reuse or recycle them. Between 1991 and 1997, Sonoco paid CSE over $12 million, yielding the brokerage a net profit of more than $2.8 million.

In carrying out the fraud scheme, James consistently misrepresented the relationship between CSE and Sonoco. He advised outside vendors that CSE had been established to protect Sonoco's confidentiality, with Sonoco's full knowledge. Similarly, CSE employees Brenda Westvold and Martha Harrison were told that Sonoco was aware of James's involvement in CSE, but they were warned not to disclose the Vinyard name to others. Both James and Michael funneled their CSE earnings through another entity, Birchwood Enterprises, so that there would be no mention of CSE on their income tax returns.

In April 1997, a disgruntled CSE client informed Sonoco of James's practice of exacting unlawful commissions in the resale of used Sonoco bags. An investigation followed, leading to the discovery of James and Michael's CSE operation and the issuance, on May 15, 1999, of an indictment charging Michael Vinyard with multiple counts of mail fraud and money laundering.[2]

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2. Michael Vinyard was indicted for mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346, as well as § 2 (aiding and abetting). Under the primary mail fraud statute, 18 U.S.C. § 1341 (2000):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of

(Cont'd)

More specifically, the indictment charged that Michael "knowingly and willfully did devise and intend to devise a scheme and artifice to defraud Sonoco . . . out of (1) the intangible right of honest services of its employee, James Stewart Vinyard, and (2) out of money and property[.]" J.A. 14. The indictment also alleged that Michael had established CSE in cooperation with James, and that they had utilized CSE to overcharge Sonoco for recycled plastic pellets, "keeping the amount of the 'mark up' for themselves." J.A. 15. Additionally, the indictment alleged that Michael and James caused Sonoco to pay substantial fees to them in connection with its grocery bag collection program, even though James bore a preexisting duty to handle the recycling program in his capacity as a Sonoco employee.

(Cont'd)

> executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . or both.

The provisions of § 1341 are modified and supplemented by the honest services doctrine, codified in 18 U.S.C. § 1346 (2000), in the following manner:

> [T]he term "scheme or artifice to defraud" [in chapter 18] includes a scheme or artifice to deprive another of the intangible right of honest services.

Michael was also indicted for money laundering, that is, for knowingly conducting financial transactions "designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership, or the control of the proceeds" of the fraud, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and § 2.

In response to the threat of prosecution for mail fraud and money laundering, James pleaded guilty, cooperated with the Government, and testified against Michael. Following a jury trial in August 1999, Michael was convicted of fourteen counts of mail fraud and twelve counts of money laundering. Michael was sentenced to seventy months imprisonment, ordered to pay $1,418,419.65 in restitution, and directed to serve three years of supervised release. He timely filed this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Michael Vinyard assigns multiple errors to the proceedings in the district court. First, and most fundamentally, he challenges the applicability of the federal mail fraud statute to his case. Michael asserts that his conduct cannot violate 18 U.S.C. §§ 1341 and 1346, because he neither intended to cause economic harm, nor caused actual economic harm, to Sonoco. Although Michael contends that he is challenging the district court's denial of his motion to dismiss the mail fraud charges, his argument more substantively constitutes a challenge to the denial of his motion for judgment of acquittal. *See* Fed. R. Crim. P. 29. In any event, the specific ruling he is contesting is not controlling, because we would affirm the district court in both situations.

We review challenges to the sufficiency of an indictment de novo, and we review the denial of a motion for judgment of acquittal for whether, when viewed most favorably to the Government, there is sufficient evidence

to sustain a conviction on the charge in question. *United States v. Butler*, 211 F.3d 826, 829 (4th Cir. 2000); *United States v. Darby*, 37 F.3d 1059, 1062 (4th Cir. 1994); *see also Glasser v. United States*, 315 U.S. 60, 80 (1942) ("It is not for us to weigh the evidence or determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.").

Second, Michael asserts that he was denied a fair trial because of prosecutorial misconduct. Specifically, he posits that the prosecution suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the prosecution made use of evidence at trial that the prosecutor had agreed would not be presented.[3] Because Michael failed to raise either of these issues in the district court, we review these contentions for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Fisher*, 58 F.3d 96, 100 (4th Cir. 1995). To meet the standard of review for plain error, Michael must demonstrate to us that there was (1) an error, (2) that it was plain, and (3) that it affected substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993) (construing the requirements of Fed. R. Crim. P. 52(b)). Furthermore, the correction of plain error lies within the discretion of this Court, and is not to be exercised "unless the error

3. Although Michael characterizes these claims as prosecutorial misconduct, Government misconduct is not necessary for a *Brady* violation. As we noted in *Spicer v. Roxbury Correctional Institute*, inadvertent failures by the state to turn over material evidence favorable to the defendant can also be the basis of a *Brady* claim. 194 F.3d 547, 555 (4th Cir. 1999).

'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

Third, Michael contends that his sentence violated the Sentencing Guidelines because the district court misapplied the Guidelines' loss enhancement provisions. When addressing an application of the Guidelines, we review the district court's "factual findings for clear error and legal interpretations de novo." *United States v. Colton*, 231 F.3d 890, 911 (4th Cir. 2000).

Fourth, Michael contests the validity of the district court's order of restitution. Although he does not challenge the magnitude of the restitution award, Michael asserts that the payment schedule developed by the court did not properly consider his financial status and prospects as required by the Mandatory Victims Restitution Act of 1996 (MVRA). We review a district court's order on restitution for an abuse of discretion. *United States v. Henoud*, 81 F.3d 484, 487 (4th Cir. 1996).

Fifth, Michael contends that he was denied a fair trial due to ineffective assistance being rendered by his counsel. Such claims are reviewed on direct appeal "if and only if it conclusively appears from the record that his attorney did not provide effective assistance." *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998); *United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995). Ineffective counsel claims receive de novo review, and they may result in relief for the defendant only if (1) the errors made by defense counsel were so serious that the representation

fell below objective standards of reasonableness, and (2) defense counsel's performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

We address these claims of error in turn.

III.

A.

1.

Michael contends that his indictment was invalid with respect to the mail fraud charges because the Government failed to allege and prove the elements required for a deprivation of honest services under §§ 1341 and 1346. More specifically, Michael asserts that actual economic harm to the employer is a necessary element of this crime in the private employment context, and that the Government failed to demonstrate that Sonoco had suffered actual economic harm as a result of Michael and James's fraudulent conduct.

Michael's assertion on this point misapprehends the requirements for an indictment. A valid indictment must "contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense." *United States v. Daniels*, 973 F.2d 272, 274 (4th Cir. 1992); *see also* Fed. R. Crim. P. 7(c)(1). In addition, we have held that "[e]very essential element of an offense must be charged in the body of an

indictment, and the inclusion of a reference to the statute will not cure the failure to do so." *Daniels*, 973 F.2d at 274. The sufficiency of an indictment turns on whether the grand jury has found and alleged all the elements of the offense charged as required by the "Fifth Amendment guarantee that no person be held to answer for an infamous crime unless on indictment of a grand jury." *Id.* (quoting *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988)). A mere statutory citation in the indictment is insufficient precisely because it does not demonstrate whether that Fifth Amendment mandate has been followed. *Id.*

The mail fraud statute makes it criminal to devise or intend to devise "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341 (2000). We have observed that the elements of mail fraud are "(1) the existence of a scheme to defraud, and (2) the mailing of a letter, etc., for the purposes of executing the scheme." *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390, 1404 (4th Cir. 1993) (quoting *United States v. Murr*, 681 F.2d 246, 248 (4th Cir. 1982)). In codifying the "honest services" doctrine in 1988, as embodied in 18 U.S.C. § 1346 (2000), Congress made it clear that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[4] Thus, the elements

4. Prior to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), the mail fraud statute had been consistently interpreted to include fraud involving the deprivation of honest (Cont'd)

of a mail fraud scheme involving the deprivation of honest services are identical to those of a normal mail fraud prosecution. Although judicial interpretation of the "honest services" doctrine has somewhat limited its scope in the private employment context, *see infra* Part III.A.2.a., those limitations have not altered the essential elements of the mail fraud offense that must be alleged in the indictment. Michael's indictment alleged that (1) Michael and James had developed a scheme to defraud Sonoco by overcharging it for plastic pellets and by setting up a sham brokerage to pocket commissions on the recycling program, and (2) that Michael and James had used the mails in the furtherance of that scheme. This indictment therefore complied with the statutory and constitutional requirements, and the district court's denial of Michael's motion to dismiss was entirely proper.

2.

a.

To the extent that Michael contends that the district court's denial of his motion for judgment of acquittal was error, we are similarly unpersuaded. Although the honest services theory of mail fraud is directed primarily at the

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services. In *McNally*, however, the Court held that schemes to deprive citizens of their rights to honest government did not fall within the scope of the mail fraud statute. *McNally*, 483 U.S. at 358-61. Congress thereafter enacted § 1346 to "restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated on deprivations of honest services." *United States v. Gray*, 96 F.3d 769, 774 n.8 (5th Cir. 1996).

deterrence and punishment of corruption among public officials, the courts have consistently recognized the statute's province to encompass dishonest acts perpetrated in private commercial settings. *See United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000) (reviewing the evolution and application of the mail fraud statute). This recognition of liability within the private sector comprehends that a corporate officer or other private employee may bear a duty of loyalty to his employer, just as a public official owes the citizenry a duty to govern honestly and impartially.

As Michael recognizes, the scope of criminal liability deriving from employer-employee relationships lacks precise definition. The plain language of the "honest services" doctrine codified in § 1346 suggests that "dishonesty by an employee, standing alone, is a crime." *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997). Under such an application of the statute, Michael's conduct is clearly within the scope of § 1346. This construction, however, potentially extends criminal liability to a broad range of employment contexts, and courts generally have been reluctant to apply § 1346 in a way that would expose employees to mail fraud prosecution for "every breach of contract or every misstatement made in the course of dealing." *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). Therefore, courts construing and applying § 1346 have consistently utilized certain principles to limit its scope in the private employment context. *See, e.g., Martin*, 228 F.3d at 17 (merely examining confidential information for employee's own purposes in breach of fiduciary duty is

insufficient for § 1346 liability, but using confidential information for employee's own purposes in a way that harms tangible employer interests is sufficient); *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) ("[T]he breach of loyalty by a private sector defendant must in each case contravene – by inherently harming – the purpose of the parties' relationship."); *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) ("[T]o be guilty of mail fraud, defendants must also cause or intend to cause actual harm or injury, and in most business contexts, that means financial or economic harm."); *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir. 1998) ("[T]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer.") (quoting *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983)); *Frost*, 125 F.3d at 369 ("[T]he prosecution must prove . . . that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim."); *Cochran*, 109 F.3d at 667 ("We [acknowledge] . . . that § 1346 must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality."); *United States v. Gray*, 96 F.3d 769, 775 (5th Cir. 1996) ("[A] breach of fiduciary duty can constitute illegal fraud . . . only when there is some detriment to the employer.") (quoting *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981)).

We have not heretofore addressed the reach of the honest services doctrine in the private employment

context; our sister circuits, however, have split over the proper approach. On the one hand, several circuits have held that the Government "must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." (the " 'reasonably foreseeable harm' test"). *Frost*, 125 F.3d at 368; *see also Martin*, 228 F.3d at 17; *deVegter*, 198 F.3d at 1328-30; *Sun-Diamond Growers*, 138 F.3d at 973-74; *Lemire*, 720 F.2d at 1337 ("The crucial determination must be whether [a] jury could infer thatthe defendant might have reasonably contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction."). On the other hand, some circuits have construed the honest services doctrine merely to require a showing that the employee possessed a fraudulent intent and that the misrepresentation at issue was material. (the "materiality test"). *Cochran*, 109 F.3d at 667; *see also Pennington*, 168 F.3d at 1065; *Gray*, 96 F.3d at 774-75.[5] Courts that prefer the materiality test have defined materiality as "any misrepresentation that has the natural tendency to influence or is capable of influencing" the employer to change his behavior. *Cochran*, 109 F.3d at 667-68 n.3;

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5. The Second and Eighth Circuits have also held that an employee does not need to breach a fiduciary duty to his employer to violate § 1346. *See United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000); *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998). In this case, however, construing the evidence in the light most favorable to the Government, James breached his fiduciary duty to Sonoco. Therefore we need not reach the issue of whether a breach of fiduciary duty is necessary for a successful § 1346 prosecution.

see also Gray, 96 F.3d at 775 ("Materiality exists whenever 'an employee has reason to believe that the information would lead a reasonable employer to change its business conduct.' ") (quoting *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981)).[6]

The two tests (the reasonably foreseeable harm test and the materiality test) are similar in many respects. We are persuaded, however, that the reasonably foreseeable harm test, as adopted and explained by the Sixth Circuit in its *Frost* decision, is the better approach. We reach this conclusion for two important reasons.[7]

First, the reasonably foreseeable harm test keeps the focus of the analysis on employee intent rather than on employer response. As we have noted, courts have generally viewed the honest services doctrine as not encompassing all breaches of legal duties in the private employment context; they have instead limited its

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6. The issue of which test constitutes the proper approach was not briefed or argued by the parties, nor addressed by the district court. However, the scope of the honest services doctrine was raised both at trial and on appeal by Michael, and his challenge to the denial of judgment of acquittal requires us to examine whether sufficient evidence was presented to support the verdict under the requirements of § 1346. Accordingly, our review of the judgment of conviction requires that we address the proper construction of the honest services doctrine in the private employment context.

7. For the most part, application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly alter his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat. *Frost*, 125 F.3d at 369.

application to particularly significant breaches of such duties. The central question, therefore, is whether the severity of the employee's fraudulent conduct is sufficient to prove a deprivation of honest services. While an employer may overreact to an insignificant fraud or under-react to a significant one, the employer's response should not affect whether the employee can be prosecuted under § 1346. By framing the test in terms of whether the employee met the threshold level of intent, the *Frost* approach keeps the focus of the § 1346 charge on the fraud, not the employer response. *Frost*, 125 F.3d at 368 ("The standard we adopt for this circuit properly focuses on the intent of the employee.").

Second, in a similar vein, the reasonably foreseeable harm test is also superior to the materiality test because it does not extend § 1346 liability to circumstances in which employers change their business practices to avoid the mere appearance of impropriety. *See id.* at 369 (contending that appearance of impropriety may provoke change even though fraud in question never constituted economic threat). Because even trivial frauds might provoke a change in business practices, bringing such a situation within the scope of § 1346 would potentially criminalize any breach of a duty of loyalty in the private employment context. *See id.* Therefore, because it both keeps the focus on employee intent and because it limits the scope of § 1346 to serious harms, we prefer the *Frost* standard, i.e., the reasonably foreseeable harm test.

b.

We next turn to the question of whether the reasonably foreseeable harm test requires proof of actual economic harm in order to establish criminal liability. In this regard, Michael contends on appeal that his indictment for mail fraud should have been dismissed because Sonoco suffered no economic harm as a result of the alleged self-dealing. In the context of private business relationships, Michael asserts, the honest services theory of mail fraud requires either an intent to cause pecuniary harm to the victim or actual pecuniary harm to the victim; self-dealing alone, according to Michael, does not satisfy the requirements of § 1346. Michael insists that the transactions between Sonoco and CSE were fair, even beneficial, to both parties, and therefore asserts that the economic loss requirement of § 1346 has not been met.

Michael's contention on this point reveals a misunderstanding of § 1346. The reasonably foreseeable harm test neither requires an actual economic loss nor an intent to economically harm the employer. *See Sun-Diamond Growers*, 138 F.3d at 974 ("Sun Diamond appears to confuse the requirement of an intent to defraud . . . with a requirement of intent to cause economic harm."). Under this test, the employee need only intend to breach his fiduciary duty and reasonably foresee that the breach would create "an identifiable economic risk" for the employer. *Frost*, 125 F.3d at 369; *see also Martin*, 228 F.3d at 17; *Sun-Diamond Growers*, 138 F.3d at 973; *Lemire*, 720 F.2d at 1337 ("There must be a failure to disclose something which in the knowledge or contemplation of

the employee poses an independent business risk to the employer."). Thus, the reasonably foreseeable harm test is met whenever, at the time of the fraud scheme, the employee could foresee that the scheme potentially might be detrimental to the employer's economic well-being. Furthermore, the concept of "economic risk" embraces the idea of risk to future opportunities for savings or profit; the focus on the employer's well-being encompasses both the long-term and the short-term health of the business. *See Frost*, 125 F.3d at 369; *Lemire*, 720 F.2d at 1338. Whether the risk materializes or not is irrelevant; the point is that the employee has no right to endanger the employer's financial health or jeopardize the employer's long-term prospects through self-dealing. Therefore, so long as the employee could have reasonably foreseen the risk to which he was exposing the employer, the requirements of § 1346 will have been met. *But see Martin*, 228 F.3d at 17 n.22 (concluding that § 1346 is satisfied by a showing of actual harm to "tangible interests").

Thus, in analyzing the propriety of the district court's denial of Michael's motion for judgment of acquittal, we must assess whether there was sufficient evidence for the jury to find that Michael willingly aided and participated in the breach of a fiduciary duty by James, and that he could reasonably foresee that the breach would create an identifiable economic risk to Sonoco. The answer to both questions is in the affirmative. James testified at length about his duty of loyalty to Sonoco, including his

contractual duty to disclose potential conflicts of interest.[8] James created the entity CSE which received over $12 million in revenues from Sonoco, yielding more than $2.8 million in profits, but he acknowledged at Michael's trial that he never disclosed his involvement with CSE to Sonoco and, in fact, that he had deliberately obscured it. James also testified that he had informed his brother, before incorporating CSE, that "if Sonoco ever found out about this, [he (James)] would get fired." J.A. 637. There was sufficient evidence for the jury to conclude that Michael was involved in, and willingly assisted in, his brother's fraud scheme to breach his duty of loyalty to Sonoco.

We also see the evidence as sufficient for the jury to conclude that the fraud scheme exposed Sonoco to a reasonably foreseeable economic risk. Regardless of whether the transactions between CSE and Sonoco were objectively fair, there is no doubt that Michael and James's deception deprived Sonoco of the chance to consider a variety of brokers and to search for the best possible price. Such conduct violates the honest services doctrine

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8. As shown at trial, James had executed an employment agreement on June 16, 1986, in which he promised, inter alia, to "disclose in writing to the company any ideas which [he had] conceived or may have conceived ... during the term of [his] employment with the company relating to any business or interests of the company, whether conceived or made during working hours or otherwise, and whether alone or jointly with others." J.A. 633. When questioned about how he understood his obligations to the company as a Sonoco employee, James acknowledged, "[E]verything I did belonged to Sonoco from that standpoint. My duties were to Sonoco." *Id.* at 632.

embodied in § 1346, in that it creates a clear risk that the employer will receive, in terms of price and quality of work, suboptimal service. *See deVegter*, 198 F.3d at 1331 (holding that corrupting process by which contracting was done constitutes reasonably foreseeable risk of economic harm because best service might not be obtained). Although James and Michael may have provided the optimal broker service to Sonoco, it is also possible that they did not, and the possibility of a suboptimal outcome was reasonably foreseeable to Michael and James at the time they defrauded Sonoco. As such, there was ample evidence for the jury to find that Michael knowingly assisted James's breach of his fiduciary duty, and that Michael should have reasonably foreseen that such a breach would expose Sonoco to an identifiable economic risk. We must therefore affirm the denial of Michael's motion for judgment of acquittal.

B.

1.

Michael also contends on appeal that two specific instances of prosecutorial misconduct denied him a fair trial. He first asserts that, in connection with his trial, the Government suppressed a three-page sentencing memorandum in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[9] This memorandum had been submitted to the court during James's sentencing hearing, and contained "numerous statements [by James] which were

9. As we noted previously, *Brady* violations do not constitute prosecutorial misconduct per se. *See supra* note 3.

substantially different from the testimony [James] gave at [the] trial of Michael Vinyard." Appellant's Brief at 20. Michael and his lawyer both attended James's sentencing hearing, and they requested the production of other evidence concerning James's testimony from the prosecutor. Significantly, they made no request for the sentencing memorandum. At his sentencing hearing, Michael informed the district court that he had not received a copy of the sentencing memorandum, and he requested that a copy be placed into evidence. At that point, however, Michael made no assertion to the court either (1) that the Government had suppressed the memorandum or (2) that his failure to receive it earlier constituted a violation of his due process rights.

There are "[t]hree 'essential components' [to] a *Brady* violation . . . : (1) the evidence must be favorable to the defendant, whether directly exculpatory or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material." *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Under the circumstances here, it is unclear whether any error, much less a plain error, occurred. We need not specifically reach that issue, however, because Michael has failed to show that his lack of access to James's sentencing memorandum in any way altered the outcome of the district court proceedings. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (defining "affecting substantial rights" as "in most cases mean[ing] that the error must have been prejudicial: It must have affected the outcome of the district court proceedings").

Although we could speculate that the memorandum might have enhanced Michael's efforts to impeach James's testimony, it is unlikely that it would have altered the trial's result; even with the memorandum, the jury would likely have credited James's trial testimony. Thus, Michael has failed to demonstrate plain error with respect to his *Brady* claim.

2.

Michael is also unable to demonstrate plain error in his claim that the Government solicited certain damaging testimony from two former employees of CSE, Bonnie Essary and Beverly Wells, after the Government had assured the district court and Michael's counsel that the witnesses would refrain from such testimony. Essary and Wells had worked in Michael's law office and each, for a time, had been assigned to work on CSE matters. Both women objected to working on CSE and were removed from CSE matters; Essary was reassigned and Wells was fired. Each received a payment from Michael, Essary as part of a Christmas bonus and Wells as severance pay, that appeared to be disproportionately large, and both women believed the payment to be "hush money" to prevent them from talking about CSE's activities. Michael moved in limine "for an Order directing the Government not to solicit speculative testimony" from these witnesses, but later withdrew the motion, apparently satisfied that the Government would not solicit such testimony. Wells then testified at trial that she believed that the severance payment made to her constituted "hush money" designed to ensure her silence on CSE matters, and Essary also

testified that Wells had conveyed a similar belief to her at the time Wells was fired.

The trial testimony of Essary and Wells concerning "hush money" was only a small portion of their overall testimony on CSE, and was even a smaller portion of the Government's evidence against Michael. As such, Michael has failed to demonstrate that the admission of this evidence affected the outcome of his trial. Moreover, Michael is unable to demonstrate that the testimony in question was erroneously admitted. Ms. Wells's opinion or perception of what the abnormally large severance payment represented was entirely relevant, and it does not appear to have been inadmissible on other grounds. *See* Fed. R. Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge."). As there was no objection to this evidence made at trial, any error was waived; regardless, we are unable to see its admission as error, plain or otherwise.

C.

Michael also contends that his sentence violated the Sentencing Guidelines because the district court inappropriately applied the loss enhancement provisions of U.S.S.G. § 2F1.1(b)(1). Specifically, Michael asserts that

the court used gain as a proxy for loss in calculating his sentence, and that such usage is barred in cases in which there was "no actual or intended loss to the victims." Appellant's Brief at 30 (quoting *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995)). Michael posits that there was no loss, because Sonoco received the services for which it bargained in its dealings with CSE and turned a profit on its recycling venture, and therefore the enhancement of his sentence under the loss enhancement provisions was improper.

We must disagree with Michael's contentions concerning his sentence. Although he is correct that "gain . . . does not support a loss enhancement under § 2F1.1(b)(1) if there was no actual, probable, or intended loss to the victims," Michael misunderstands the meaning of "loss" in this context. *United States v. Marcus*, 82 F.3d 606, 608 (4th Cir. 1996). His argument is that "loss" under 2F1.1(b)(1) should be judged by whether the defrauded party suffered an absolute economic loss on the transaction; if the transaction was profitable, then loss enhancement provisions are not applied. However, the relevant question is not whether the victim lost money on the transaction, but whether the victim was deprived of assets or services it would have possessed absent the fraud. *See Marcus*, 82 F.3d at 608 ("A determination of the amount of loss suffered focuses, as it does in theft cases, on the value of the money, property, or services unlawfully taken.") (quoting U.S.S.G. § 2F1.1(b)(1), comment (n.7)). The issue of "loss" therefore turns on how much Sonoco paid for the broker services of CSE versus how much it would have paid for those services absent

Michael and James's fraud scheme. With respect to these determinations, we must accord deference to the district court, and we review its findings only for clear error. *See United States v. Colton*, 231 F.3d 890, 911 (4th Cir. 2000). In this instance, the district court found that if James had disclosed his capacity to handle the recycling operation, Sonoco would have quickly brought the vast majority of the services in-house. The court therefore concluded that the profit earned by CSE in its dealings with Sonoco constituted the excess amount Sonoco paid as a result of the fraud scheme. Such findings are not clearly erroneous, and we must reject Michael's contention on this point.

D.

Michael also challenges the schedule for restitution payments arranged by the district court. The court ordered Michael to pay $1,418,419.65 in restitution and, after finding that his net worth was $683,700, directed Michael to pay the outstanding balance at the rate of $5,000 per month, beginning thirty days after his release from prison. Although not disputing the magnitude of the restitution award, Michael contends that the court did not adequately consider his financial status and earning potential, as required by the MVRA, in structuring his restitution payments, and that it consequently created and imposed an unrealistic payment schedule.

In formulating the manner in which restitution is to be paid, the district court "is required [under MVRA] to consider: (1) the financial resources of the defendant . . . ; (2) projected earnings and other income of the defendant;

and (3) any financial obligations of the defendant, including obligations to dependents." *United States v. Alalade*, 204 F.3d 536, 539 (4th Cir. 2000); *see also* 18 U.S.C. § 3664(f)(2). Although a restitution order that requires Michael to pay $60,000 a year in restitution may seem excessive for a sixty-two year old lawyer convicted of mail fraud, the court made substantial findings regarding Michael's assets and earning capacity. Moreover, the court's sentencing order specifically directed that it be kept continuously apprized of Michael's financial status, and the court reserved the right to modify the restitution payment schedule if Michael's status changed. Under these circumstances, the court's establishment of the schedule for restitution payments was not an abuse of its discretion.

E.

Michael also asserts that his trial counsel's performance was constitutionally ineffective. He bases this contention on multiple grounds: (1) his lawyer's failure to timely obtain James's sentencing memorandum; (2) the failure of counsel to secure the exclusion of the Wells/Essary testimony; and (3) the failure of his lawyer to object to the judge's "willful blindness" jury instruction.[10] Since Michael raises the ineffective

10. The Government requested that the district court instruct the jury that the knowledge requirement of a § 1341 mail fraud charge was met if the Government demonstrated that Michael deliberately disregarded or consciously avoided information concerning the true nature of CSE. The court accepted the Government's request, and it instructed the jury that the "government can also meet its burden of (Cont'd)

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assistance claim for the first time on direct appeal, we can address it only if it "conclusively appears" from the record "that his attorney did not provide effective assistance." *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998); *see also United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995). *But cf. United States v. Russell*, 221 F.3d 615, 619 (4th Cir. 2000) (addressing ineffective assistance claim on direct appeal subsequent to Rule 33 motion for new trial). It is by no means clear on this record that Michael's lawyer was constitutionally ineffective; indeed, none of the asserted "errors" appear to be sufficiently significant to meet the prejudice requirement of *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). As such, Michael has failed to meet the standard mandated by *Martinez* and *Smith*, and we will not address the merits of his ineffective assistance of counsel claim. If Michael desires to have this claim adjudicated, he must raise it by way of a collateral challenge. *Smith*, 62 F.3d at 651.

IV.

Pursuant to the foregoing, we find no reversible error in the underlying proceedings, and we affirm Michael Vinyard's convictions and sentence.

AFFIRMED

(Cont'd)
showing that a defendant had actual knowledge of falsity if it establishes beyond a reasonable doubt that he acted with deliberate disregard of the truth or with conscious purpose to avoid learning the truth." J.A. 1181.

APPENDIX B – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA DATED AND FILED JUNE 5, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Case Number: 4:99CR00429-01

UNITED STATES OF AMERICA

vs.

MICHAEL CHARLES VINYARD

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Lionel S. Lofton and Robert E. Breckenridge, II, Retained
Defendant's Attorney

THE DEFENDANT:

* * *

■ was found guilty on counts 7-32 on August 26, 1999 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1341, 1346 and 2	Please see indictment	5/5/99	7-20
18:1956 (a)(1)(B)(i) and 2	Please see indictment	1/23/97	21-32

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

■ Counts 1-6 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 479-52-7099	May 24, 2000 Date of Imposition of Judgment
Defendant's Date of Birth: 1/17/44	
Defendant's USM No.: 95594-071	s/ Cameron McGowan Currie Signature of Judicial Officer
Defendant's Residence Address: 2 Birchwood Heights Dr. Ottumwa, Iowa 52501	Honorable Cameron McGowan Currie, United States District Judge Name & Title of Judicial Officer
Defendant's Mailing Address: 2 Birchwood Heights Dr. Ottumwa, Iowa 52501	June 5, 2000 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of seventy (70) months. This sentence consists of sixty (60) months (maximum statute) as to counts 7-20 and seventy (70) months as to counts 21-32. All counts to run concurrently.

■ The court makes the following recommendations to the Bureau of Prisons:

That defendant serve sentence at Federal Prison Camp Yankton, South Dakota or Deluth, Minnesota, participate in the Bureau of Prisons' Financial Responsibility Program and not report before September 1, 2000.

* * *

■ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

* * *

■ as notified by the United States Marshal **BUT NOT BEFORE SEPTEMBER 1, 2000.**

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three 3 years as to counts 7-20 and three (3) years as to counts 21-32. All counts to run concurrently. While on supervised release the defendant shall comply with the mandatory and standard conditions outlined in Title 18 USC 3583(d) and the following special conditions:

Appendix B

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay outstanding restitution in the amount of at least $5,000 per month to the victims beginning 30 days after release. The restitution is to be distributed in equal amounts to each of the victims. The court retains the authority to adjust the payments should the defendant's financial status change. Payments shall be directed to the Clerk, U. S. District Court to be forwarded to the victims. Total restitution for this defendant $1,418,419.65 (See page 4 Criminal Monetary Penalties)

The court recognizes the defendant may not make full restitution prior to the expiration of supervision; however, he is to make a good faith effort toward this obligation. At the direction of the Probation Officer, the defendant shall provide financial statements to include personal and business income tax returns, as requested so the court may be fully aware of his financial status.

2. The defendant shall participate in a program of testing and treatment for alcohol abuse if deemed necessary and appropriate by the probation officer until the defendant is released from the program by the probation officer.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- ■ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

- ■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Appendix B

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the **"Clerk, U.S. District Court"** unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	**Restitution**
Totals:	$ 2,600.00	$ 1,418,419.65

The above special assessment is due immediately.

* * *

RESTITUTION

* * *

The defendant shall pay interest on any restitution of more than $2,500, unless the restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - The interest requirement is waived.

* * *

Name & Mailing Address of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Federal Insurance Company c/o Mozley Finlayson and Loggins, LLP 1 Premier Plaza, Suite 900, 5605 Glenridge Drive Atlanta, Georgia 30342 ATT: C. David Hailey	$2,586,839.30	$1,293,419.65	½
Sonoco Products Company 814 North Second Street Hartsville, SC 29550 ATT: James H. Shelley - A14	$250,000.00	$125,000.00	½
Totals:	**$2,836,839.30**	**$1,418,419.65**	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix B

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ■ in full immediately (special assessment)

* * *

E ■ in installments of at least $5,000.00 per month to commence 30 days after release from confinement.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the Probation Officer, or the United States Attorney.

STATEMENT OF REASONS

Information on this page reflects ranges under Sentencing Guidelines and is used for statistical purposes only. Please refer to other pages in the judgment for the actual sentence.

* * *

■ The court adopts the factual findings and guideline application in the presentence report except (see, attachment, if necessary); as amended on the record

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 12,500.00 to $5,569,889

■ Fine waived because of inability to pay.

Total Amount of Restitution: $1,418,419.65

* * *

■ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 10, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-4442
CR-99-429

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL CHARLES VINYARD

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
MAY 17 2002
CLERK

No. 01-1186

In the Supreme Court of the United States

MICHAEL CHARLES VINYARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
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QUESTIONS PRESENTED

1. Whether petitioner's participation in a fraud scheme that involved self-dealing by a company employee constituted an "honest services" fraud under 18 U.S.C. 1341, 1346.

2. Whether the court of appeals correctly held that, under the plain error standard, petitioner did not establish that the government had suppressed allegedly exculpatory evidence.

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In the Supreme Court of the United States

No. 01-1186

MICHAEL CHARLES VINYARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 266 F.3d 320.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2001. A petition for rehearing was denied on October 10, 2001. Pet. App. 40a-41a. The petition for a writ of certiorari was filed on January 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of 14 counts of mail fraud, in violation of 18

U.S.C. 1341, 1346; and 12 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 70 months of imprisonment, $1,418,419.65 in restitution, and three years of supervised release. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was a partner in a law firm in Ottumwa, Iowa. Petitioner's brother, James Vinyard, worked for Sonoco Products Corporation in Hartsville, South Carolina. Sonoco manufactured plastic T-shirt grocery bags for grocery and convenience stores nationwide. In April 1990, Sonoco began a recycling program. James was assigned to find a method to reuse the internal scrap that was a by-product of manufacturing grocery bags, and to develop a program to collect and recycle used grocery bags. James concluded that Sonoco could recycle its scrap internally, but that it could not recycle used grocery bags because they were often too contaminated when returned to Sonoco. James believed that Sonoco could manufacture grocery bags from the recycled scrap ("pellets") from other companies, which would be cheaper than using virgin plastic products. Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

James learned that Mindis, a Georgia company, could recycle plastics and recommended that Sonoco enter into a joint venture with Mindis to recycle Sonoco's used grocery bags. James also recommended that Sonoco create an internal recycling unit that James would head. Sonoco rejected both recommendations. Disappointed by Sonoco's rejection of his recycling recommendations, James schemed to defraud Sonoco by creating a private company to broker deals between Sonoco and recycling companies for personal profit. James contacted petitioner and persuaded him to join the scheme for a share of the profits. James explained to petitioner that James needed to conceal his role in

the scheme because self-dealing was a violation of James's employment contract with Sonoco. Pet. App. 3a; Gov't C.A. Br. 3-4.

Petitioner and James then formed Charles Stewart Enterprises (CSE). ("Charles" and "Stewart" are the brothers' middle names.) CSE was incorporated in Ottumwa; Pat Curran, Michael's law partner, was listed as CSE's corporate officer on CSE's annual report. James agreed to make CSE's business decisions. Petitioner agreed to handle administrative chores such as billing and invoicing. Pet. App. 3a; Gov't C.A. Br. 4.

CSE's business office was located in petitioner's law firm. Petitioner added a separate phone line at the firm that was to be used for CSE's business only. Petitioner directed the law firm staff not to answer calls in the name of the law firm on the CSE line. Petitioner told a secretary that it might be a "conflict of interest" if the law firm were associated with CSE. Petitioner told another secretary not to fax any materials to James at Sonoco unless she knew that he was at work to receive the fax. Petitioner answered "Charles Stewart" when taking calls on the CSE telephone line. When a secretary objected to working on CSE matters, petitioner fired her and gave her $1000 in cash. Pet. App. 3a-4a; Gov't C.A. Br. 4-5.

Meanwhile, James caused Sonoco to enter into several deals with recycling companies using CSE as a broker. In 1991, Dean Soti, the owner of Jadcore, Inc. in Terre Haute, Indiana, called James and offered to sell recycled plastic pellets to Sonoco. James accepted Jadcore's offer but told Jadcore to bill CSE because Sonoco did not want its customers to know that it was using recycled products to manufacture grocery bags. James marked the price of the pellets up by two or three cents per pound as CSE's "commission" before

selling them to Sonoco. Gov't C.A. Br. 5. CSE also brokered a deal between Sonoco and Security International in New Orleans, Louisiana, under which Security recycled Sonoco's used grocery bags. Sonoco paid an additional three cents per pound as CSE's commission. *Ibid.*

Between 1991 and 1997, Sonoco paid CSE $12,115,785.69; CSE's net profit was more than $2.8 million. Sonoco paid CSE with checks that were drawn on a bank in South Carolina and sent by United States mail to CSE in Iowa. Pet. App. 4a; Gov't C.A. Br. 5. As a result of the scheme, petitioner received about $1.2 million from CSE. By contrast, he earned less than $290,000 from his law practice during the same time period. Gov't C.A. Br. 6.

In 1994, a Sonoco vice president reviewed CSE's relationship with Sonoco and concluded that the costs of doing business with CSE were too high. Sonoco officials repeatedly tried to meet with "Charles Stewart" to re-evaluate their relationship, but James repeatedly stalled them. See Tr. 409. Independent of the CSE scheme, James demanded kickbacks from some of Sonoco's other recycling customers as a condition of Sonoco's continued business with them. In April 1997, a disgruntled customer reported James's kickback scheme to Sonoco, which resulted in an investigation into James's conduct and Sonoco's discovery of the fraudulent scheme involving CSE. Pet. App. 4a; Gov't C.A. Br. 5-6.

2. Before petitioner's trial, James pleaded guilty and agreed to cooperate with the government by testifying against petitioner. Petitioner and his attorney attended James's sentencing hearing on August 3, 1999. At that hearing, James submitted a sentencing memorandum that had been prepared and signed by Peggy

Swalis, a sentencing consultant. James served a copy of the document on the government the day before the sentencing hearing. The Swalis memorandum included a "statement of the defendant" that was written in the first person and enclosed in quotation marks. The "statement of the defendant" said that Sonoco had authorized James to deal with Sonoco through CSE and that James had told petitioner that CSE had been approved by Sonoco. The prosecutor and the district court remarked that those statements were inconsistent with James's guilty plea. James then withdrew the Swalis memorandum from evidence.

James testified as a government witness against petitioner at petitioner's trial, which took place in late August 1999. Gov't C.A. Br. 12-13. James testified, among other things, that petitioner knew of the scheme to defraud Sonoco and willingly participated in it. After deliberating for less than a day, the jury found petitioner guilty. Several months later, at his sentencing hearing, petitioner informed the district court that he had not been furnished with a copy of the Swalis memorandum. The district court stated that the document was written and prepared by Swalis, not by James. James's attorney concurred, stating that the Swalis memorandum was "not signed by [James] and [James] never testified that he adopted it." Gov't C.A. Br. 13.

3. Petitioner appealed his conviction and sentence, and the court of appeals affirmed.

a. Petitioner primarily argued that he had not violated 18 U.S.C. 1341 and 1346 because "he neither intended to cause economic harm, nor caused actual economic harm, to Sonoco." Pet. App. 6a. The court of appeals rejected that argument, holding that neither an intent to cause harm nor actual economic harm to the

victim is a necessary element of mail fraud. *Id.* at 17a. In enacting 18 U.S.C. 1346, the court explained, "Congress made it clear that the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services." *Id.* at 10a (some internal quotation marks omitted). Although "honest services" mail fraud prosecutions most often involve public officials, "the courts have consistently recognized the statute's province to encompass dishonest acts perpetrated in private commercial settings." *Id.* at 12a.

The court of appeals observed that, to ensure that employees are not exposed "to mail fraud prosecution for every breach of contract or every misstatement made in the course of dealing," federal courts had generally imposed narrowing constructions on 18 U.S.C. 1346. Pet. App. 12a (internal quotation marks omitted). Some courts had done so by adopting a "reasonably foreseeable harm" test whenever "honest services" fraud was charged in connection with private breaches of trust. Under that test, an employee's fraudulent breach of fiduciary duty and use of the mails in connection therewith can constitute mail fraud only if "the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 14a. The court of appeals also indicated that other courts had employed a "materiality test." Under that approach, the government must show not only the intent to deceive, but also that the deception was "material." *Ibid.* A representation or omission is material, the court of appeals explained, if it "'has the natural tendency to influence or is capable of influencing' the employer to change his behavior." *Ibid.*

The court of appeals explained that the two formulations "are similar in many respects." Pet. App. 15a. "For the most part," it noted, "application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly" consider altering "his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat." *Id.* at 15a n.7. Nonetheless, the court of appeals decided to apply the "reasonably foreseeable harm" test in this case because it focuses on the intent of the defendant, rather than what the court thought to be the potentially idiosyncratic response of the victim, and because it better ensures that the mail fraud statute will apply only to "particularly significant" deceptions. *Id.* at 16a-17a. The court held that, in private sector "honest services" fraud cases, the government must prove that the employee could foresee that his fraud scheme "potentially might be detrimental to the employer's economic well-being." *Id.* at 17a-18a.

The court of appeals rejected petitioner's contention that there can be no mail fraud absent actual or intended "economic harm as a result of the alleged self-dealing." Pet. App. 17a. That contention, the court explained, "reveals a misunderstanding of § 1346." *Ibid.* Section 1346, the court explained, does not by its terms require the defendant to intend or cause an actual economic injury. At most, it requires that the employee "intend to breach his fiduciary duty and reasonably foresee that the breach would create 'an identifiable economic risk' for the employer." *Ibid.* "Whether the risk materializes or not," the court held, "is irrelevant; the point is that the employee has no right to endanger the employer's financial health or

jeopardize the employer's long-term prospects through self-dealing." *Id.* at 18a.

The court of appeals also concluded that, on the facts of this case, the district court had not erred in denying petitioner's motion for a judgment of acquittal. Pet. App. 18a. The evidence was sufficient to show both that petitioner "willingly aided and participated in the breach of a fiduciary duty" by his brother James "and that he could reasonably foresee that the breach would create an identifiable economic risk to Sonoco." *Ibid.* The court stressed that James had a contractual duty to disclose conflicts of interest to his employer, Sonoco; that he and petitioner had created CSE to conceal the fact that James was directing Sonoco's business to himself, as broker, and profiting therefrom; and that the two received more than $12 million in revenues and more than $2.8 million in profits from Sonoco. *Id.* at 18a-19a. The court concluded that those activities "exposed Sonoco to a reasonably foreseeable economic risk." *Id.* at 19a. Even if the transactions between CSE and Sonoco were objectively fair, the court explained, "there is no doubt that [petitioner's and his brother's] deception deprived Sonoco of the chance to consider a variety of brokers and to search for the best possible price." *Ibid.*

b. The court of appeals also rejected petitioner's claim that the government had suppressed exculpatory evidence. Petitioner argued that the prosecutor had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over the Swalis memorandum, which had been submitted to the court during James's sentencing hearing. Although petitioner and his lawyer were present at James's sentencing hearing, they had "made no request for the sentencing memorandum." Pet. App. 21a.

Because petitioner failed to raise the issue at trial, the court reviewed the alleged *Brady* violation for plain error. Pet. App. 7a. Under the circumstances, the court found that "it is unclear whether any error, much less a plain error, occurred." *Id.* at 21a. The court declined to address whether there was error, however, because it concluded that any error did not affect the outcome. *Ibid.* Although the memorandum may have assisted petitioner in impeaching James's testimony, the court found it "unlikely that it would have altered the trial's result." *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 5-17) that his mail fraud convictions are invalid because there was insufficient evidence to prove that he actually harmed or intended to harm the victim of the fraudulent scheme. He also contends that the government violated *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Those contentions lack merit and do not otherwise warrant this Court's review.

1. The mail fraud statute makes it unlawful to use the United States mails to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Before this Court decided *United States* v. *McNally*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the "intangible right" to the honest services of government officials. In *McNally*, this Court disagreed, holding that the mail fraud statute reaches only schemes that seek to deprive victims of money or property. *McNally*, 483 U.S. at 356, 358-359.

In response, Congress enacted 18 U.S.C. 1346, to return the law to its pre-*McNally* state. Section 1346

provides that the phrase "scheme to defraud" in 18 U.S.C. 1341 includes any scheme "to deprive another of the intangible right of honest services." Although frauds involving a "deprivation of honest services" often arise in the context of "corruption among public officials," Pet. App. 11a-12a, Section 1346 does not limit itself to cases of public corruption. Instead, as the lower federal courts "have consistently recognized," Section 1346 also extends the mail fraud statute to certain corrupt acts (like bribery) "perpetrated in private commercial settings," if those acts fraudulently deprive the victim of the "honest services" of, for example, a fiduciary. Pet. App. 12a.

Seeking to avoid a perceived potentially overbroad construction of Section 1346, the courts of appeals have generally agreed that, if "honest services" mail fraud is charged in the context of private corruption, the government must show (among other things) that the deception was material, *i.e.*, that it had the natural tendency or capability to influence the victim's conduct, or that it exposed the employer to reasonably foreseeable economic injury. See Pet. App. 12a-15a (citing cases from the 1st, 5th, 6th, 8th, 10th, 11th and D.C. Circuits). Petitioner does not dispute the propriety of that limit on Section 1346's scope. To the contrary, he endorses it. "In this context," he states, "it is only where the nondisclosure poses *a business risk* to the employer that there is a violation of the mail fraud statute." Pet. 9 (emphasis added).

The decision below properly applied that standard to the facts of this case. To demonstrate mail fraud, the court held, the government must show not only a fraudulent breach of fiduciary duty, but also that "the breach would create 'an identifiable economic risk' for the employer." Pet. App. 17a. After reviewing the

evidence, the court of appeals found that the fraudulent scheme perpetrated by petitioner and his brother had indeed created an "identifiable economic risk" for the victim, Sonoco. James deceived Sonoco by concealing his role in CSE from Sonoco and engaging in self-dealing, despite his clear duty to disclose conflicts of interest. Further, petitioner and James could reasonably foresee harm to Sonoco, because their scheme "deprived Sonoco of the chance to consider a variety of brokers and to search for the best possible price." *Id.* at 19a. Indeed, rather than search for a broker who could arrange for recycling services or obtain recycled plastics with the lowest prices and commissions, James directed Sonoco's recycled plastics needs through CSE, the front he and his brother had established. Cf. *United States* v. *Montani*, 204 F.3d 761, 768 (7th Cir. 2000) (even if employer got the "best price the market would bear," actions were fraudulent because the employer was entitled to "the best efforts of its" fiduciary "without paying a premium in the form of secret profits"). On the facts of this case, moreover, a reasonable jury could infer that Sonoco was actually harmed by the fraudulent scheme. In 1994, a Sonoco vice president reviewed Sonoco's relationship with CSE and concluded that the costs of doing business with CSE were too high. It was for that reason that Sonoco representatives attempted to contact "Charles Stewart," only to be stalled by petitioner. See p. 4, *supra*. And James Vinyard testified that, while Sonoco officials "expected to get the lowest possible price," they "didn't," because he and his brother "cheated them." Tr. 226.[1]

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[1] Petitioner does not seem to dispute that Sonoco might have fared better or bargained for lesser commissions absent the self-dealing. To the contrary, petitioner appears to concede the infer-

Although petitioner endorses the standard employed by the court of appeals, Pet. 9, petitioner also appears to propose a further requirement. Deprivation of "honest services" in a private commercial setting cannot amount to mail fraud, he argues, unless the defendant actually inflicted harm on or intended to inflict harm on the victim. He thus contends that a "private-sector scheme to defraud which is based on a deprivation of a right to 'honest services' under § 1346 must at the very least contemplate that there be some intended harm to the victim." Pet. 9; see also *id.* at 7 (no mail fraud occurs unless "the defendant either intended to inflict or actually inflicted" harm on the target).[2]

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ence that, "but for the actions of" petitioner and his brother, Sonoco "could have kept the whole $4,095,051.62" that was saved through the use of recycled plastics. Pet. 15. Thus, because of the fraudulent scheme, Sonoco paid a significant portion of its potential profits (more than $2.8 million) to petitioner and his brother as commissions. As James Vinyard testified, Sonoco may have "saved money" by using recycled plastic, "but [it] could have saved a lot more." Tr. 200. Petitioner nonetheless appears to argue that there was no fraud because James told Sonoco that it could save money by not using a broker. See *id.* at 12-13. That fact-bound contention lacks merit. Even if James told Sonoco it could save some money, he nonetheless concealed the facts that he was channeling the brokerage function to his own business—rather than seeking the best available deal—and that he and petitioner were making millions as a result.

[2] At points, petitioner appears to accept the proposition that *potential* harm to the employer is sufficient, objecting instead to the additional requirement that the potential injury be "reasonably foreseeable." See Pet. i. To the extent the court of appeals required the government to show not only a potential harm to the victim but also that the harm was reasonably foreseeable to petitioner, the imposition of that additional burden on the government caused petitioner no injury.

That contention is incorrect. To prove honest services mail fraud in violation of 18 U.S.C. 1341 and 1346, "the government need not prove either that the defendant intended to cause the victim economic or pecuniary harm or that such harm actually resulted from the scheme to defraud." *United States* v. *Rybicki*, 287 F.3d 257, 2002 WL 741636, at *4 (2d Cir. Apr. 23, 2002).[3] The cases petitioner cites do not support his contrary view, and often expressly reject it. For example, while petitioner relies on and quotes at length from *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998), see Pet. 5-6, *Frost* specifically holds that the government need *not* prove that the defendant intended to harm or actually harmed the victim. "[A] defendant accused of scheming to deprive another of honest services" in violation of Sections 1341 and 1346, *Frost* holds, "does *not* have to intend to inflict an economic harm upon the victim." 125 F.3d at 369 (emphasis added). Instead, under *Frost*, the government need "prove only that the defendant intended to breach his fiduciary duty, and reasonably *should have foreseen* that the breach would create an identifiable *economic*

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[3] Nevertheless, there was such harm in this case. See p. 11 & n.1 *supra*. Moreover, the jury was instructed that it could find petitioner guilty of mail fraud for "obtain[ing] money * * * by means of false or fraudulent pretenses, representations or promises" in violation of 18 U.S.C. 1341. Tr. 665. In this case, petitioner and his brother obtained millions of dollars from Sonoco through CSE, all under the fraudulent pretense that CSE was an independent broker, when in fact it was a shell designed to hide the fact that a Sonoco employee (petitioner's brother, James) was directing Sonoco's business to himself at a substantial profit. Petitioner does not raise any challenge to the jury instructions, nor has he disputed the sufficiency of the evidence on the "money or property" theory that was submitted to the jury.

risk to the victim." *Ibid.* (emphasis added). That is precisely the standard the court of appeals applied in this case. Pet. App. 17a, 19a.

Petitioner's reliance (Pet. 8-9) on *United States* v. *Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999), is misplaced for identical reasons. *Sun Diamond*, like *Frost*, rejects the claim that actual or intended injury must be proved. See 138 F.3d at 974 ("[W]e disagree with Sun-Diamond's contention that § 1346 and [*United States* v. *Lemire*, 720 F.2d 1327 (D.C. Cir.), cert. denied, 467 U.S. 1226 (1983),] require the government to show that the defendant intended to cause economic harm to his victim."). Instead, *Sun Diamond*, like *Frost*, holds that a misrepresentation or nondisclosure may constitute mail fraud if the misrepresentation or nondisclosure "poses an independent business risk to the employer," *i.e.*, if economic harm is "reasonably foreseeable." *Id.* at 973. In other words, where self-dealing by an employee in breach of a fiduciary duty is fraudulent, it may constitute an "honest services" fraud under Section 1346 if it exposes the employer to a reasonably foreseeable potential injury. See *United States* v. *Martin*, 228 F.3d 1, 17-18 (1st Cir. 2000); *Montani*, 204 F.3d at 768, 769; *United States* v. *DeVegter*, 198 F.3d 1324, 1330 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000).[4]

The remaining cases cited by petitioner likewise do not support his position. In *United States* v. *Cochran*,

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[4] For the same reason, the courts of appeals generally agree that a public official commits "honest services" fraud if, in violation of state criminal law, he conceals his own financial interest in a transaction while undertaking discretionary action that will benefit that financial interest. See *United States* v. *Panarella*, 277 F.3d 678, 694-695 (3d Cir. 2002) (collecting cases).

109 F.3d 660 (10th Cir. 1997), see Pet. 6-7, the court of appeals held that the government must provide evidence "independent of the alleged scheme * * * to show fraudulent intent toward the alleged victims" in "*the absence of actual or potential harm.*" 109 F.3d at 668 (emphasis added).[5] Here, there was "potential harm." As the court of appeals explained, petitioner's fraud deprived Sonoco of the opportunity to seek better prices from other brokers. Pet. App. 19a; pp. 10-11, *supra*. Similarly, in *United States* v. *Jain*, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), the court of appeals did not require proof of an intent to harm the victim. Instead, declining to "define the outer limits of the private sector rights to 'honest services' that are now protected by § 1346," the court concluded that nondisclosure cannot support a mail fraud conviction unless it is "material." 93 F.3d at 442. The court concluded that the nondisclosure in that case was not material because there was no evidence that any of the alleged victims would have considered the information material if "it did not affect the quality or cost" of the services. *Ibid.* Here, in contrast, the deceit was material to Sonoco—it prevented Sonoco from learning that one of its employees was channeling Sonoco's business to himself at a substantial profit, and it prevented Sonoco from seeking better terms from a different broker or intermediary. Furthermore, neither *Cochran* nor *Jain* involved self-dealing by an employee with a

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[5] In *Cochran*, a bond underwriter negotiated a deal between a buyer and seller and received a secret fee from the buyer. The court ruled that an "honest services" fraud was not shown. The court stressed that the seller was not entitled to the fee, so that the underwriter's concealment of the fee did not harm the seller, and that the seller would not have changed his conduct if the disclosure had been made. 109 F.3d at 668-669.

fiduciary duty, so neither is particularly comparable to this case.[6]

Ultimately, petitioner's claim that the government must prove *actual* or *intended* economic loss to the victim is not an effort to construe Section 1346 but an attempt to nullify it. *Rybicki*, 2002 WL 741636, at *4 (rejecting proposed rule requiring "actual or intended economic or pecuniary harm to the victim" because "[s]uch a reading would vitiate § 1346 and would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another"). Even absent Section 1346, the mail fraud statute covers cases in which the defendant intended the victim to lose tangible property or money. As this Court explained in *McNally*—before Section 1346 was enacted—"the words 'to defraud'" in Section 1341 "refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value.'" 483 U.S. at 358. Section 1346 was enacted to cover cases in which there is no actual or intended economic loss to the victim—cases where the scheme deprives the victim of the "intangible right to honest services."[7]

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[6] Petitioner's reliance (Pet. 15-16) on *United States* v. *Barnes*, 125 F.3d 1287 (9th Cir. 1997); *United States* v. *Maurello*, 76 F.3d 1304 (3d Cir. 1996); and *United States* v. *Dickler*, 64 F.3d 818 (3d Cir. 1995), is also misplaced. Those cases involved the proper measure of loss under the Sentencing Guidelines. None of those cases involved the scope of Section 1346.

[7] Petitioner's reliance (Pet. 11-12) on *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994), is similarly misplaced. *D'Amato* did not involve a scheme to deprive the victim of its right to "honest services" in violation of 18 U.S.C. 1346. In any event, the Second Circuit recently clarified in *Rybicki* that it does *not* require proof

2. Although petitioner does not press the issue, the decision below states that the courts of appeals have adopted different tests for determining the scope of "honest services" frauds covered by Section 1346 in the private sector. Several courts of appeals have concluded that, in cases of private corruption, the government must show that the fraudulent scheme exposed the victim to "an identifiable economic risk," Pet. App. 17a, or "a reasonably foreseeable economic risk," *id.* at 19a. That standard—endorsed by petitioner and employed by the decision below—has been expressly adopted by the First, Second, Sixth, Eleventh, and District of Columbia Circuits. See *Rybicki*, 2002 WL 741636, at *7-*8; *Martin*, 228 F.3d at 17-18; *Frost*, 125 F.3d at 369; *DeVegter*, 198 F.3d at 1330; *Sun-Diamond*, 138 F.3d at 974.

Nonetheless, the decision below suggests that other courts have adopted a different standard for private-sector "honest services" fraud, requiring the government to prove that the defendant possessed fraudulent intent and made a material misrepresentation. Pet. App. 14a (citing cases from the Eighth and Tenth Circuits, among others). The government does not believe that those cases conflict with the cases that employ a foreseeable-business-risk test. The cases requiring proof of intent and materiality merely recognize that Section 1346 does not establish a separate fraud offense, but rather defines honest-services fraud under the mail-fraud offense created by Section 1341. Because fraudulent intent and materiality are elements of mail fraud under Section 1341, they are also elements of honest-services mail fraud under Sections 1341 and

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of actual or intended economic harm in a Section 1346 honest-services case. 2002 WL 741636, at *3-*4.

1346 (whether the mail fraud takes place in the private or public sector).

In *Cochran*, 109 F.3d at 667, the Tenth Circuit stated that Section 1346 "must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality," citing the Eighth Circuit's decision in *Jain*, 93 F.3d at 442. *Jain*, in turn, did not attempt to "define the outer limits of the private sector rights to 'honest services' [under] § 1346." Instead, relying on the fact that Section 1346 "does not stand alone—it modifies the definition of 'scheme or artifice to defraud' in § 1341"—*Jain* held that materiality and intent always must be proved to establish mail fraud. 93 F.3d at 442. Those cases do not reject the identifiable-business-risk standard used in other circuits.[8]

In any event, petitioner does not argue that the court of appeals erred in requiring proof that "the nondisclosure pose[d] a business risk to the employer." Pet. 9; p. 10, *supra*. To the contrary, petitioner relies extensively on cases—such as *Frost* and *Sun-Diamond*—applying that test. Application of an intent-and-materiality formulation would not alter the outcome of this case. As the court of appeals explained, "application of the materiality approach" is often "identical to the reason-

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[8] The decision below also cited *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999), and *United States* v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). In *Pennington*, the Eighth Circuit stated only that proof of fraudulent intent could be inferred from a fiduciary's willful nondisclosure of "material information that he ha[d] a duty to disclose." 168 F.3d at 1065. In *Gray*, the Fifth Circuit upheld the defendants' convictions after finding that they failed to disclose material information, but did not otherwise determine the reach of Section 1346 in private honest-services fraud cases. 96 F.3d at 774-775.

ably foreseeable harm test." Pet. App. 15a n.7. A misrepresentation or omission is generally considered "material" if it "'has the natural tendency to influence or is capable of influencing' the employer to change his behavior." *Id.* at 15a. If a deception exposes an employer to an identifiable business risk, it is also material, "because an employer would almost certainly" consider altering "his business practices if disclosure of a fraud scheme revealed either forgone business opportunities or an economic threat." *Id.* at 15a n.7. Furthermore, in this case, fraudulent intent and materiality were manifest. James's active concealment of his self-dealing, despite his contractual obligation to disclose it, undoubtedly was "material." See *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987); *United States* v. *Dial*, 757 F.2d 163, 168 (7th Cir.), cert. denied, 474 U.S. 838 (1985). And the intent to defraud was more than amply proved. Petitioner and his brother not only deceived Sonoco, but exploited that deception to enrich themselves by $2.8 million at Sonoco's expense.

3. Petitioner also contends (Pet. 17-27) that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by suppressing the Swalis memorandum. That claim is largely fact-bound and does not warrant further review.

Because petitioner did not raise a *Brady* claim before the district court, the claim is reviewable only for plain error. See Fed. R. Crim. P. 52(b).[9] To establish plain error, a defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected

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[9] Petitioner suggests (Pet. 25) that he could not have raised the issue at trial because he was not aware of the issue then. If that is true, he could have raised the issue at sentencing, after informing the court that he had not received the Swalis memorandum at trial.

his substantial rights. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999); *United States* v. *Olano*, 507 U.S. 725 (1993). Even if a defendant establishes those pre-requisities, a reviewing court should exercise its discretion to correct the error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Jones*, 527 U.S. at 388-389. In this case, there was no error, much less plain error.

Due process is violated if the prosecution suppresses evidence favorable to the accused where the evidence is material to guilt or punishment, regardless of the intent of the prosecutor. The duty to disclose the evidence applies even if the accused has not requested the evidence, and that duty applies to impeachment evidence as well as exculpatory evidence. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999); *United States* v. *Bagley*, 473 U.S. 667, 676 (1985); *Brady*, 373 U.S. at 87. Evidence is not "suppressed" if the defendant knew or should have known of the existence of the evidence at trial. See *Spicer* v. *Roxbury Corr. Inst.*, 194 F.3d 547, 557-558 (4th Cir. 1999); *United States* v. *Torres*, 129 F.3d 710, 716 (2d Cir. 1997).

The Swalis memorandum was neither exculpatory nor suppressed by the government. The memorandum did not exculpate petitioner because it was a hearsay statement by Swalis, a sentencing consultant, not a statement by James. Accordingly, petitioner could not have impeached James at trial with Swalis's statement. For that reason alone, there is no reason to believe that, had petitioner obtained the memorandum at or before

trial, he could have used it to alter the outcome of the case. Furthermore, the memorandum was not suppressed by the government. The memorandum was submitted in open court as a defense exhibit during James's sentencing hearing—a hearing that both petitioner and his lawyer attended.[10] In any event, the court of appeals properly concluded that, in view of the evidence, there was no reasonable probability that disclosure of the document would have altered the outcome of the trial. That case- and record-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner also argues (Pet. 25) that the government suborned perjury from James at trial. Petitioner's sole support for that contention, however, is the Swalis memorandum, which James never signed or otherwise verified.